IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 16 OF 2003

Yaniv Cohen,
(Israeli National),
Presently lodged in
Central Jail, Aguada,
Sinquerim, Bardez, Goa. ... Appellant

versus

State of Goa,
As represented by
Officer-In-charge,
A.N.C. Police Station,
Police Head Quarters,
Panaji, Goa. ... Respondent

Mr. Lalit Chari, Senior Advocate with Mr. P. Saldanha and Mr. J. P. D'Souza, Advocates for the Appellant.

Mr. S. N. Sardessai, Public Prosecutor for the Respondent/ State.

CORAM : P. V. HARDAS, J.

DATE : 5TH DECEMBER,2003.

ORAL JUDGMENT

The Appellant/Accused being aggrieved by the Judgment of the learned Special Judge, Narcotic Drugs and Psychotropic Substances Court, Mapusa, Goa, convicting him for an offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing him to undergo Rigorous Imprisonment for 10 years and to pay fine of Rs.1,00,000/-, in default of payment of fine Simple

Imprisonment for six months, has filed the present Appeal challenging his conviction and sentence.

2. The facts in brief as are necessary for the decision of this Appeal are set out hereunder:-

P.W.5, P.I. Uday Naik, was attached to the Anti Narcotic Cell Police Station as a P.S.I. in March, 2001. On 9th March, 2001, at 10.00 a.m., he received a specific and reliable information, through his sources, that one Israeli National, aged 26 years, with fair complexion, tall and having curly hair, staying in rented room of House No.871 at Sorantowado, Anjuna, is selling Ecstasy tablets. In receipt of the said information, P.W.5, P.I. Uday Naik, reduced the said information in writing and sent a copy to his superior namely P.W.9, Dy.S.P. Finton D'Souza. The copy of the information received by P.W.9, Dy.S.P. Finton D'Souza, is at Exh.57 colly. P.W.5, P.I. Uday Naik, then secured two panchas namely P.W.3, Santosh Mandrekar and P.W.4, Sunil Mandrekar, at about 12.00 noon. He requested both of them to act as panch witnesses and also informed them regarding the receipt of the prior reliable information. P.W.5, P.I. Uday Naik, also informed them that he had handed over a copy of the information which was reduced to writing to P.W.9, Dy.S.P. Finton D'Souza. On the two persons agreeing to

act as panch witnesses, they were introduced to the members of the raiding party which consisted of P.W.9, Dy.S.P. Finton D'Souza and other Police Officers. At about 12.30 p.m., the raiding party consisting of the panch and the Police Officers left in Police jeep and private motor cycle for going towards Sorantowado, Anjuna. P.W.5, P.I. Uday Naik, carried with him the seal of Anti Narcotic Cell Panaji Goa-2 with Ashoka Emblem. One Police Constable carried with him a kit box containing weighing, packing and sealing material etc. One other Constable carried with him a typewriter of the Anti Narcotic Cell Police Station. The members of the raiding party reached at Sorantowado, Anjuna at about 1.00 p.m. and parked their vehicles on the main road. P.W.5, P.I. Uday Naik, alighted from the vehicle and went on reconnaissance mission and returned back confirming the location of the house where the present Accused regarding whom the information was received that he was alleged to be residing there. Thereafter, the rest of the raiding party also alighted from the vehicle and set off in the direction of the house. The raiding party reached the house at about 1.25 p.m. On entering the said house, they found the house to be consisting of three rooms with a veranda in front. They reached the door of room no.2 and saw that it was ajar and one foreigner was sitting on the bed. P.W.5, P.I. Uday Naik, knocked on the door. P.W.5, P.I. Uday Naik, then

introduced himself to the foreigner, who was identified during the trial as the Accused. On being questioned, the Accused disclosed his name as Yaniv Cohen, Israeli National, aged 22 years. P.W.5, P.I. Uday Naik, then introduced the members of the raiding party including the panchas and informed the Accused about the receipt of the information and told the Accused that he wanted to take his search. The Accused was also informed that he had a right to be searched before a Gazetted Officer or a Magistrate of his choice but the Accused declined the offer. The Accused was informed that he had a right to search the members of the raiding party but the Accused also declined to exercise that right. Thereafter, the personal search of the Accused was conducted and in the right side pant pocket, two white coloured tablets suspected to be Ecstasy tablets were found. The said two tablets were then put in an envelope, packed and sealed with 7 seals of Anti Narcotic Cell Panaji Goa-2 with Ashoka Emblem. The sealed envelope was signed by P.W.5, P.I. Uday Naik and both the panchas but the Accused declined to sign the same. Thereafter, a search of the room was undertaken and during the search, one transparent polythene bag containing white coloured tablets placed in the right side corner of the room was noticed. P.W.5, P.I. Uday Naik, picked up the said transparent polythene bag and observed white coloured tablets inside the white

polythene bag. After observing the said tablets in the said polythene bag, P.W.5, P.I. Uday Naik, informed the raiding party that he suspected the said tablets to be Ecstasy tablets. The tablets in the polythene bag were counted and were 691 in number. They were weighed along with the polythene bag and were found to weigh 123 gms. The tablets along with the polythene bag were put in an envelope which was packed and sealed in the manner similar to the sealing of the earlier Ecstasy tablets and as before was signed by P.W.5, P.I. Uday Naik and the two panchas. During the search of the room, an amount of Rs.15,000/- in Indian currency consisting of 4 currency notes of Rs.500/- each and 130 currency notes of Rs.100/- each and 60 US Dollars were found. The currency notes were placed in an envelope, packed and sealed as before. The trouser which the Accused was wearing was also packed and sealed. Since the Accused did not have valid documents in respect of possession of the drug, he was informed the grounds of arrest and was taken in custody. The key of the said room was later on handed over to the owner of the room. The Accused was again offered the search of the members of the raiding party which was declined by him. A Seizure Report was prepared which is at Exh.40. A panchanama of the entire sequence of event was drawn and is at Exh.41. A letter was typed at the spot addressed to the Director of Central Forensic Science Laboratory on which specimen

seal was affixed. The said letter is at Exh.20. Similarly, another letter at Exh. 54 was prepared addressed to P.W.9, Dy.S.P. Finton D'Souza handing over the seal for safe custody. The raiding party thereafter returned to the Anti Narcotic Cell Police Station where a complaint at Exh. 55 was filed by P.W.5, P.I. Uday Naik, on the basis of which an offence under Section 22 of the Narcotic Drugs and Psychotropic Substances Act vide Crime No.29/2001 was registered. The seal of the Anti Narcotic Cell Police Station was handed over to P.W.9, Dy.S.P. Finton D'Souza, along with the letter at Exh.54. Thereafter, intimation under Section 57 of the Narcotic Drugs and Psychotropic Substances Act vide Exh.56 was given to the superiors. The seized property was kept in the muddemal room.

3. On the next morning, P.W.5, P.I. Uday Naik, forwarded two sealed envelopes to the Laboratory through Crime Branch. On 10th March, 2001, another panchanama at Exh.58 was drawn. The sample sent for analysis was received by P.W.2, Krishna Shetgaonkar, along with the covering letter at Exh.24. P.W.2, Krishna Shetgaonkar, has acknowledged the receipt of the samples on the said letter. On the same day i.e. on 10th March, 2001, he placed the sealed envelope in a sealed cupboard under lock and key and on 13th March, 2001, along with PC. Buckle No. 2876 and P.C. Buckle No.4476, the sample so

received was sent for analysis. The sample so received was received on 19th March, 2001, by P.W.1, S. N. Rasool, Junior Scientific Officer of Central Forensic Science Laboratory, Hyderabad. P.W.1, S. N. Rasool, examined the samples on 21st March, 2001 and found that the seals were intact and tallied with the specimen sealed impression. He opened one sample which contained two tablets weighing .3195 gms. He opened the second sample which contained 691 tablets weighing approximately 115.9956 gms. He analysed both the tablets from the envelope and took 50 tablets as representative sample from the other envelope. P.W.1, S. N. Rasool, by his report at Exh.21 opined that the tablets examined by him were identified as N-Methyl methylenedioxyamphetamine.

4. Further to the completion of investigation, a charge-sheet against the Appellant/Accused came to be filed. The learned Special Judge, Narcotic Drugs and Psychotropic Substances Court, Mapusa, vide Exh.7 framed a charge against the Appellant for an offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act. The Appellant pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 10 witnesses. The learned Trial Court accepting the prosecution case convicted and sentenced the Accused as aforestated.

5. Mr. Lalit Chari, learned Senior Counsel appearing on behalf of the Appellant has urged before me that the evidence relating to the raid is full of infirmities and, therefore, needs to be rejected. He has further urged that the forwarding letter at Exh.20 could not have been prepared at the spot as claimed by P.W.5, P.I. Uday Naik as the crime number is stated therein and according to P.W.5, P.I. Uday Naik, the offence was registered only after returning to the Police Station. Mr. Chari, learned Senior Counsel appearing on behalf of the Appellant has also submitted that there is no discrepancy in the evidence in respect of possession of the room as also there is no reliable evidence in respect of the specific place in the room from where the drugs were seized. The learned Senior Counsel appearing on behalf of the Appellant has further submitted that a quantitative analysis of the various drugs was not done as also the qualitative analysis. According to the learned Senior Counsel appearing on behalf of the Appellant, the report does not disclose the percentage of the drug as the tablets were not the pure form of the drug but the drug is found in small quantity in the tablet. So, therefore, according to the learned Senior Counsel appearing on behalf of the Appellant the weight of each tablet would not necessarily indicate the weight of the contraband/drug in the tablet. According to the learned Senior Counsel

appearing on behalf of the Appellant in the absence of such evidence, the Accused cannot be convicted for an offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act but would be liable for being in possession of the minimum quantity.

6. Mr. S. N. Sardessai, learned Public Prosecutor appearing on behalf of the State has defended the Judgment of the learned Trial Court in order to support his contention that the forwarding letter at Exh.20 was not prepared at the spot.

7. Mr. Lalit Chari, learned Senior Counsel appearing on behalf of the Appellant, has invited my attention to the letter at Exh.20. A perusal of the said letter shows that it is a forwarding letter addressed to the Director, Central Forensic Science Laboratory, Hyderabad, requesting for examination of the seized drugs. However, in the said letter, in one of the columns, Crime No.9/2001 is disclosed. Admittedly, according to P.W.5, P.I. Uday Naik, the offence was registered after he returned to the Police Station. It is, therefore, contended on behalf of the Appellant that in the said letter, if it was prepared at the spot, Crime Number would not have been mentioned. It is useful to make a reference to the cross-examination of

P.W.5, P.I. Uday Naik. He was asked the following question:-

> Q. Can you state the sequence of the crime number vis a vis registration of the complaint?
>
> Ans. Normally before going for the raid, we are aware of the Cr. number and that only after the complaint is registered the Cr. no. is allotted.

8. He was further asked the following question:-

> Q. Was the Cr. number on the forwarding note to the laboratory part of Exh.20 colly put at the spot of the raid?
>
> Ans. No. It was put at the police station while the other particulars were prepared at the spot of the raid and except the timing.

9. Except the Crime number and the time the other details in the forwarding note Exh.20 colly were filed at the spot. The numerals of the crime number and the timing on the forwarding note are kept blank while the other details are typed at the spot. I admit that the numerals of the crime number and the time on the forwarding note are on typewriter which is the same as carried at the spot.

10. He has denied the suggestion that this document at Exh.20 colly was not prepared at the spot. He has further stated that while he was entering the property in the muddemal register the forwarding note at Exh.20 was given to PC Atchut Gawas to put the details of the Crime number and time. He has further stated that there is no particular reason as to why the Crime number and time on the said forwarding note Exh.20 colly was not entered in hand.

11. Merely because the Crime number and other details appeared to have been typed on a different typewriter that would not necessarily indicate that the letter at Exh.20 colly was not prepared at the spot. P.W.5, P.I. Uday Naik, has clearly stated that except Crime number and other details the rest of the contents of the letter at Exh.20 colly were prepared at the spot.

12. It was next urged that there were discrepancies in the evidence in respect of the possession of the room by the Accused and the discrepant version regarding handing over of the keys. The prosecution has examined P.W.8, Paul Pinto, who is the owner of the house. Though, this witness was declared hostile and examined by the prosecution, he has admitted that the room was given to the Appellant/Accused for a period of 6 months and the rent being Rs.4000/-. The

prosecution has also examined P.W.6, Christina Pinto, wife of P.W.8, Paul Pinto. This witness was also declared hostile and cross-examined. She has also stated that a room was given to the Appellant/Accused on rent. Though, in the cross-examination, on behalf of the Accused, she has admitted not having stated to the Police about room no.2 being given to the Accused on rent, the fact remains that the Appellant/Accused had taken a room on rent in House No.187 belonging to P.W.8, Paul Pinto. The Appellant in his statement under Section 313 of the Code of Criminal Procedure has denied of having taken the room on rent. According to the Accused, in his statement submitted in writing at Exh.80, the Accused has claimed that he had visited some Israeli girls and the girls were called out by some person. The girls left the room saying that they would be returning shortly. Soon some persons entered the room saying that there were police, grabbed and forced him to sit in the jeep which was parked on the road. The Accused has further stated that he was residing in the room of some known christian family whose name he does not remember. Though, there are slight discrepancies in the evidence of P.W.6, Christina Pinto and P.W.8, Paul Pinto, the prosecution has been successful in establishing that the Accused had taken a room on rent in the house owned by P.W.8, Paul Pinto. Minor discrepancies in respect of the possession of the

keys is not really very material. It is next urged that P.W.3, Santosh Mandrekar, in his evidence, has stated that the polythene bag containing Ecstasy tablets was found in the right hand side of the room. No doubt, P.W.3, Santosh Mandrekar, was cross-examined in respect of the news item published by him in the newspaper as a reporter and the contents of the news item do not corroborate his version. In fact, he admits in the cross-examination that he has no written record to show that the news item in the Goa Times is as per his despatch. He admits not to have taken exception to the incorrect reporting by the press. In the panchanama at Exh.40, the exact place in the room where the bag was found is not stated. All that the panchanama recites is that P.W.5, P.I. Uday Naik, found a polythene bag containing white tablets on the right hand side corner of the room. P.W.4, Sunil Mandrekar, the other panch also states that the bag was found in the right hand side of the room. He has denied the suggestion that no tablets were found in the room. P.W.5, P.I. Uday Naik, in his evidence has stated that in the right side corner of the room, he found a polythene bag containing the tablets. Therefore, there is consistent version of panch witness P.W.4, Sunil Mandrekar and P.W.5, P.I. Uday Naik and despite the evidence of P.W.3, Santosh Mandrekar, the prosecution has been able to establish that in the right hand corner of the room a polythene

bag was found. The Accused was in possession of the room. The Accused can be said to be in conscious possession of the drugs which were said to be seized. Lastly, it is submitted that the entire quantity of the drugs was not analysed and what was analysed were only few tablets from each of the sample. The analysis as conducted by P.W.1, S. N. Rasool, does not give the percentage of the drug found in the tablet and, therefore, in the absence of a qualitative analysis of the tablet, the Accused cannot be convicted for an offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 but would be liable for conviction for being in possession of small quantity of the drug. A perusal of the evidence of P.W.1, S. N. Rasool, would show that he had received one envelope which contained 2 tablets and on weighing he found them to weigh .3195 gms. From the second envelope containing 691 tablets P.W.1, S. N. Rasool, had taken 50 tablets for analysis. In the re-examination, he has stated that the weight of 50 tablets from the second envelope was 8.1941 gms. Thus, he has analysed tablets weighing 8.5136 gms. In the cross-examination, he has admitted "I have not carried out quantitative analysis since I was not called upon to do so". P.W.1, S. N. Rasool, has further admitted "normally the tablets has bulk of binders such as starch or some other neutral ingredients and entire tablet is

not a drug". I had not carried out any test to find out what is the extent of drug contents in it and the neutral contents accordingly. I cannot say anything to the suggestion that over 90% of the substance was neutral substance and not amphetamine as I did not carry out any quantitative tests.(Emphasis supplied).

13. He has further stated in the cross-examination "when I have referred to police sample earlier in my statement, it was in the context of taking small quantities of each tablets, mixing up the same and taking as a representative sample for conducting GCMS Test.

14. Curiously, he has also admitted that the sampling method recommended by United Nations is not on the basis of weight but on dosage units. He has also admitted that in his report, there is a note that the result relates only to the exhibits tested and which would have reference to the 50 tablets from second envelope and 2 tablets from the first envelope analysed by him. He has also admitted that he was not 100% certain whether all the balance tablets would test positive for amphetamine.

15. In the present instance, in view of the peculiar facts of the case that this witness has

admitted that tablets have bulk of binders such as starch or some other neutral ingredients, it was incumbent for the prosecution to have requested for a qualitative analysis. Based on the weight of the tablet, therefore, it would be held that the Accused was in possession of the drug corresponding to the weight of the tablet. Since only 50 plus 2 tablets were analysed, it cannot be said that the Accused was in possession of the drug in respect of the balance quantity of the tablets which were not analysed. However, since the tablets analysed have tested positive for the drug and there is nothing to doubt the correctness of the finding and in the absence of any qualitative analysis, it will have to be held that the Accused was in possession of the small quantity of the drug as stated in the Narcotic Drugs and Psychotropic Substances Act. The Accused would, therefore, be guilty for an offence punishable under Section 20(ii)(A) of the Narcotic Drugs and Psychotropic Substances Act. His conviction for an offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act is, therefore, unsustainable.

16. In the result, therefore, this Criminal Appeal is partly allowed. The conviction and sentence imposed on the Appellant by the learned Special Judge, Narcotic Drugs and Psychotropic Substances Court, Mapusa, by

Judgment dated 24th January, 2003, in Special Criminal Case No.28 of 2001, for an offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act and sentence to Rigorous Imprisonment for 10 years and fine of Rs.1,00,000/- in default Simple Imprisonment for 6 months, is quashed and set aside and is substituted by conviction under Section 20(ii)(A) and is sentenced to imprisonment already undergone and fine of Rs.5000/- with default stipulation of Simple Imprisonment for 1 month, in case fine is not paid. The Appellant be released forthwith, if not wanted in any other case.

P. V. HARDAS, J.

RD.